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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re S.W., a Person Coming Under the  
Juvenile Court Law.

STANISLAUS COUNTY  
COMMUNITY SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

F059317

(Super. Ct. No. 510800)

**OPINION**

**THE COURT**\*

APPEAL from orders of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County County, and Linda S. Macy, Deputy County Counsel, for Plaintiff and Respondent.

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\*Before Wiseman, Acting P.J., Gomes, J., and Dawson, J.

D.W. (father) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to his daughter, S.W. (child).<sup>1</sup> He contends the court abused its discretion by denying his petition (§ 388) to either regain custody of the child or reopen reunification services at the permanency planning stage. Father also argues the court erred by not finding that termination would be detrimental to the child based on her relationship with him. On review, we disagree and affirm.

### **PROCEDURAL AND FACTUAL HISTORY**

In April 2008, when the child in this case was four years old, respondent Stanislaus County Community Services Agency (agency) detained her and initiated the underlying dependency proceedings. Her mother's mental health problems interfered with her ability to care for the child. Father, who had a decades-long history of substance abuse and domestic violence, was incarcerated at the time. He had neither seen the child nor had contact with her for approximately 18 months.

In June 2008, the Stanislaus County Superior Court (juvenile court) exercised its dependency jurisdiction over the child due to parental neglect (§ 300, subd. (b)), adjudged her a dependent, and removed her from parental custody. The juvenile court also ordered reunification services.

Father had been released from custody as of the June 2008 hearing. He was placed in New Life, a six-month residential drug treatment program, as a condition of his parole. Drug and alcohol treatment were among his court-ordered services.

#### ***Reunification Period***

Once father completed his "black out period" at New Life in July 2008, twice-a-month visits between him and the child commenced. Initially, the child did not recognize father or engage with him. She had not seen him since she was a toddler. Father,

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

however, tried to engage the child with toys and play. She responded very well to his interaction.

As of a six-month review hearing conducted in October 2008, father was regularly participating and making good progress in reunification services. By that point, the child had begun to recognize father and look forward to their visits. On the recommendation of the agency and request by the father, the juvenile court granted the agency discretion for extended visits between the child and father. After a period of extended visits, the agency could also allow overnight visits for the child with father.

Father completed the New Life program in December 2008 and entered Solidarity, a clean and sober living program. He also received outpatient substance abuse services. Father complied with and actively participated in all of Solidarity's program requirements. Once father entered Solidarity, the child visited him there. Over time, the agency gradually increased visitation to twice-a-month, weekend visits. Solidarity reported no concerns regarding the visitation.

In mid-April 2009, the juvenile court continued reunification services for father and authorized the agency to begin the child on a trial visit with father. The extended visit started April 15. By early June 2009, father graduated from Solidarity and completed outpatient services. Since the child came to live with father, first at Solidarity and later in a home he rented, she appeared very happy to be with him. She visited her foster parents during weekends.<sup>2</sup> The foster parents also provided respite care for the child.

Based on father's progress, as well as his commitment to sobriety and the child, the agency in July 2009 recommended that the juvenile court grant father custody of the

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<sup>2</sup> The juvenile court had previously designated the foster parents as the child's de facto parents.

child subject to family maintenance services. On July 13, 2009, the juvenile court agreed and released the child to the father's custody, under the agency's supervision.

### ***Supplemental Proceedings***

Two days later, father was arrested for driving under the influence and child endangerment. He had admittedly relapsed during a camping trip with the child. The same day the child was taken into protective custody. Thereafter, the agency initiated supplemental proceedings (§ 387) to once again remove her from parental custody.

In September 2009, the juvenile court sustained the supplemental petition, finding its previous disposition of placing the child in father's custody had been ineffective in protecting the child. By the time of that hearing, father was once again in a residential treatment program and was unavailable to care for the child. Thus, the juvenile court ordered the child removed from parental custody.

The recommended substance abuse treatment for father was another six-month program, consisting of 90 days of residential treatment and 90 days of outpatient treatment. Given the recommended six-month program and the fact that the 18-month statutory period for reunification lapsed in October 2009, the juvenile court also denied additional reunification services for father. In essence, father could not successfully complete treatment and resume care of the child within the brief time remaining. The juvenile court did order, however, twice-a-month visits between the child and father. In so doing, the juvenile court observed the child currently had a positive relationship with father.

In response, father's attorney requested a bonding study be performed between father and the child to assist the juvenile court in determining whether adoption was the most appropriate permanent plan for the child. The juvenile court granted the request and concluded the hearing by setting a December 2009 section 366.26 hearing to select and

implement a permanent plan for the child. Father did not challenge the juvenile court's decision.

***Father's Section 388 Petition***

Two months later in November 2009, father filed a petition under section 388 requesting that the juvenile court either award him custody of the child or grant him six additional months of reunification services. Since the September hearing, father graduated from residential treatment and had once again entered Solidarity's clean and sober living and aftercare treatment program. The child could live with him in Solidarity's clean and sober residence. Father claimed he was committed to remaining clean and sober and had a sponsor to help him work through a 12-step program. Father also alleged it would be in the child's best interest to reunify with him. He claimed the child was attached to him and would otherwise be adversely affected.

The juvenile court conducted a hearing on father's petition in December 2009. At the hearing, father testified he had been sober for 120 days, living at Solidarity, and continuing with its program requirements. He also attended both Narcotics Anonymous and Alcoholics Anonymous meetings. It was his understanding that the child could live with him at Solidarity. He also felt he was ready to provide full care and a stable home for her. Father described as well his twice-monthly visits with the child during which they played games together.

On cross-examination, father explained he started at Solidarity in early October after participating in another program at Nirvana. There he did 30 days of inpatient treatment and 30 days at Nirvana's sober living house. Father also acknowledged he previously was in Solidarity between mid-December 2008 and May 2009.

This time, he wanted to stay at Solidarity for a year minimum. He could stay for two to three years. At the time of his testimony, he was still in active treatment for his addiction. He believed he previously left Solidarity too early. His experience at

Solidarity was different this time in terms of his increased understanding of his alcoholism.

If the child were to live with father at Solidarity, there would be people to baby-sit her, along with other children who lived there, during the frequent meetings father would have to attend. Previously, father testified there was a lot of cursing at Solidarity and “stuff that goes on around there with the other children” led him to move out of there with the child. The child also had shared with her foster parents that there were a few daycare incidents at Solidarity in which she was hit by the other children. In one incident, she was slapped and punched in the stomach.

In addition, father relied on a bonding study, prepared in November 2009 by psychologist Jeffrey Miller, and admitted into evidence. According to the bonding study, the child appeared to have a significant attachment to father, appeared to benefit from visits with him, and would suffer emotional harm if she were to lose the relationship.

The bonding study also described how at times the child was angry towards father because, according to the child, he ““does bad stuff, and drinks beer in the car without a license, and drugs, and goes to jail.”” She had ““seen it.””

The child’s primary attachments were with her foster parents. She did report she was sad when she missed seeing father. However, she also told the psychologist she sometimes had sad dreams about missing her foster parents. Asked what would happen to her if she could no longer see or visit with her father, the child said ““I’d stay at mommy Melody’s”” (the foster mother).

The juvenile court denied father’s section 388 petition. The juvenile court explained:

“At this juncture, the Court must look to permanency for this child, and there is case law authority that says that after termination of services to a parent, that is when the Court must view the child’s best interests as the primary interests as opposed to what the parent has done or not done.

“It is very commendable that [father] has continued in his efforts to overcome his addiction to alcohol. And the Court does find that there is a change of circumstances. That change of circumstances being that he has addressed the relapse, that he has gone into inpatient, and now is in outpatient, and that he now has a home for [the child].

“However, the second prong on the 388 petition is to show that it would be in the child’s best interests to grant the 388 petition. And looking at Dr. Miller’s report, he identifies that this child’s primary attachments are with her current foster-adopt parents. And, although, she has a strong attachment to her father, and she appears to benefit from visits with him, her primary attachments are with her current caregivers; so the Court finds that the best interests prong has not been met on this 388 petition, and it is on that basis that the Court is denying the 388 petition filed by [father].”

### ***Section 366.26 Permanency Planning Hearing***

Prior to the section 366.26 hearing, the agency filed its report recommending that the court select a permanent plan of adoption for the child and terminate parental rights. The agency described the child as healthy, affectionate, and very likely to be adopted. It also identified the child’s foster parents, to whom she was bonded, as her prospective adoptive parents.

At the eventual hearing conducted in January 2010, the likelihood of the child’s adoption was undisputed. The focus was instead on whether termination would be detrimental to the child based on her parent-child relationship.

Dr. Miller testified to his belief that it would be detrimental if the child were no longer able to have any type of relationship with father. In the psychologist’s opinion, the child appeared to have a close relationship with father. Not having contact with him would cause the child some emotional impairment in the short term. The psychologist was also concerned that possible problems with attachment could emerge later since the child would not have father in her life. Dr. Miller claimed his assessment also took into account the attachment the child had to her foster parents. However, he later testified he

had not looked at all aspects of the case in terms of the child's relationship with her foster parents.

Dr. Miller further testified there was a need to balance the stability of an adoptive home versus the sadness a child might feel in terminating parental rights. That was an issue for the court to consider. He could not say the detriment he predicted would be so significant in the child's life that the court should not implement adoption. Again, it was up to the court.

The psychologist acknowledged a lot of children, if not all children, would experience some grief and loss over losing contact with one of their parents. To some extent, it would be very hard to determine what degree of detriment the child might suffer. Dr. Miller could only state from what he saw of their relationship, it appeared father was a very important and primary figure to the child. She would experience a significant loss at least in the short term.

The psychologist had spent one hour with father, watched him and the child for three-quarters of an hour, and talked with the child for a half hour. Asked if this was enough time to assess the types of attachment between the child and father, the psychologist replied, "I think it is always a snapshot." Nevertheless, he felt he had enough information to offer an opinion. The child had a fairly secure attachment with father while they were together. When pressed to characterize the interaction between father and the child, Dr. Miller described it as somewhere in between a casual contact with a relative or friend and the child's relationship with her foster parents.

Long-term effects were more difficult to predict than short-term ones. Long-term detriment was possible because the child was old enough to remember father and would remember they had a close relationship at one time. The psychologist's concern was that the child's separation from father would lead to some problems in her future relationships with others. This could occur sometimes when there was no contact with a biological



parent who had been an important part of a child's life. However, it was hard to predict for young children. Also, for three out of the first four years of this five-year-old child's life, she had very little contact with father. Thus, it seemed unlikely that he would have been an important part of her life. Since visitation started, they nonetheless formed a very close relationship.

In addition, the psychologist admitted the child showed much more concern about whether she was going to lose her foster parents than whether she would be unable to see her father in the future. She displayed a degree of anxiety at the beginning of her session with father over whether she would be left there and unable to go back with her foster parents. That was a major concern of hers. She also showed hesitation at the beginning of the session to enter the room where father was. She entered after the psychologist and foster mother encouraged the child to enter.

The psychologist did not see any concern or anxiety on the child's part when she left father. When asked what would happen to her if she could not see father again, the child responded matter of factly that she would live with her foster mother.

The child's foster mother also testified at the section 366.26 hearing. She transported the child to and from visits with father. The child did not react one way or another when told she would have a visit with him. She was neither sad nor tearful when a visit ended with father. In between the twice-monthly visits, the child did not ask about her father or mention going to visit him. Sometimes father would call the child at the foster home. He was welcome to do so. Their conversations were four or five minutes long in length.

The supervising social worker, Philip Sugerman, also testified. Sugerman received the child's case in September 2009. He also supervised two visits between the child and father, once in November and the other in December. During those visits, the child interacted well with and responded well to father. They tended "to kind of wrestle

around and be very active.” There was affection between the two. The child smiled and laughed during the visits. She also recognized father as her father and referred to him as “Daddy D[.]” Sugerman had not received any reports of problems with visitation between father and the child.

The child’s former social worker testified similarly as well about contact she observed between father and the child. Father and the child’s relationship began to develop approximately four months into the case, around October or November 2008.

The former social worker also testified about a brief visit she had with the child when she had to be redetained after father’s arrest in July 2009. The child was distraught that father drank beer. The child cried and said she was very scared. She wanted to go to her “Mommy M[.]” (the child’s foster mother).

Father testified in opposition to the agency’s recommendation that parental rights be terminated. He felt he had a bonded relationship with the child. He had formed a relationship with her since the start of the dependency proceedings and regularly visited with her. He described his relationship with her in glowing terms. The child seemed to enjoy the time with him. At least once she asked when she would see him next. Usually she asked whether she would see “grandma” at the next visit.

Following closing arguments, the juvenile court first found the child was likely to be adopted. “The real heart of the issue” was whether the child would be greatly harmed if parental rights were severed. Having considered all of the evidence presented, the juvenile court found the parents had not met their burden to show there would be detriment if parental rights were severed. In so finding, the court advised that it did not give much weight to Dr. Miller’s testimony. The court, in turn, selected adoption as its permanent plan for the child and terminated parental rights.

## DISCUSSION

### I. Section 388 Petition

Father contends the juvenile court based its denial of his section 388 petition solely on the fact that the child's primary attachment was with her foster parents. With this as his premise, father goes on to argue he did not have to prove his daughter's primary attachment was with him in order to prevail. In father's view, the court used an inaccurate legal standard entitling him to reversal. Father's argument fails for two important reasons.

One, he overlooks the scope of our appellate review. It is judicial action and not judicial reasoning which is the proper subject of appellate review. (*El Centro Grain Co. v. Bank of Italy, etc.* (1932) 123 Cal.App. 564, 567.) We review a court's ruling, not its reasoning. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.)

Two, father's argument focuses too narrowly on one portion of the juvenile court's ruling so far as the child's best interests were concerned. The court did state that the child's primary attachments are with her current caregivers, as Dr. Miller had opined. However, the juvenile court also observed that, at this juncture, it must look to permanency for the child.

The juvenile court's observation was in line with the rule as stated in *In re Stephanie M.* (1994) 7 Cal.4th 295 (*Stephanie M.*). By the time a child's dependency has reached the permanency planning stage, a parent's interest in the care, custody, and companionship of the child is no longer paramount. Rather, the court's focus shifts to the child's needs for permanency and stability. In fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a modification petition at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Id.* at

p. 317.) Here, father offered no proof that an order returning custody or reopening reunification services would promote the child's needs for permanence and stability.

Furthermore, according to father's own testimony, he was still in active treatment for his addiction. He also felt the need to remain at Solidarity this time for at least a year before going out on his own again and putting what he had learned to the test. Although father's candor is commendable, such evidence supports a conclusion that the child's future would be placed in a holding pattern, awaiting the outcome of father's additional treatment and the testing of what father learned this time from a clean and sober living environment. Thus, the court actually could determine the relief father sought, in fact, would not promote the child's needs for permanence and stability. In addition, the court could have found that living at Solidarity was not in the child's best interests based on her prior experiences there. Meanwhile, the child's primary attachments were with her current caregivers, reinforcing the fact that she had the opportunity for permanency and stability in their home. In any event, we do not interpret the juvenile court's remarks as some misapprehension of the law. We conclude the juvenile court did not abuse its discretion by denying father's section 388 petition. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

## **II. Beneficial Parent/Child Relationship Exception**

Father also contends the court erred because it did not find that termination would be detrimental to the child based on her relationship with him. According to father, the court's decision not to apply the beneficial relationship exception under section 366.26, subdivision (c)(1)(B)(i), was not supported by substantial evidence. As discussed below, we disagree. Father's contention is both legally and factually meritless.

To begin, father relies on an incorrect standard of review for the juvenile court's decision. Section 366.26, subdivision (c)(1)(B), acknowledges termination may be detrimental under specifically designated circumstances. However, a finding of no

detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.)

Termination is presumptively in an adoptable child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) It is the opposing party's burden to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) Thus, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim. Instead, the question is whether the juvenile court abused its discretion by denying the parent's request. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) For this to occur, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Based on our review of the record, we conclude the juvenile court properly exercised its discretion in ruling as it did. As the juvenile court explained, father had to establish that the child would be greatly harmed by termination to prevail on his detriment argument.

“[T]he parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: ‘balance ... the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.’ (*Id.* at p. 575.)” (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342.)

Here, the proof father offered did not compel a finding in his favor as a matter of law. The juvenile court could properly exercise its discretion as it did. While Dr. Miller did testify it would be detrimental if the child were no longer to have any type of relationship with father, his opinion did not withstand scrutiny.

For example, the psychologist believed the child would experience an emotional loss in the short term. Yet, he went to acknowledge many if not all children would experience some grief and loss over losing contact with a parent. Also, the psychologist could not testify that the child was anxious or concerned if she could no longer see father again. In a matter of fact way, the child told Dr. Miller she would live with her foster mother if she could not see father. The child showed much more concern about losing her foster parents. The psychologist even characterized this as a major concern on the child's part.

It also appeared to Dr. Miller that father was a very important and primary figure to the child. Yet, the psychologist watched them together for less than an hour in reaching his assessment and conceded it was a snapshot. He also admitted the interaction between father and the child was somewhere in between a casual contact with a relative or friend and the child's relationship with her foster parents. While he initially claimed his assessment took into the child's attachment to her foster parents, Dr. Miller later acknowledged he had not looked at all aspects of the case in terms of the child's relationship with her foster parents.

Although Dr. Miller expressed concern that a possible problem with the child's attachments could later emerge, he admitted long-term detriment was difficult to predict. Also, he noted a child's problems with future relationships could occur when there was no contact with a parent who had been an important part of the child's life. However, he admitted this was hard to predict for young children and it was unlikely father would have been an important part of this child's life. For three out of the first four years of the

child's life, she had very little contact with father. It was also undisputed that the child had essentially no relationship with father at the start of these proceedings.

Finally, Dr. Miller could not say the detriment he predicted would be so significant in the child's life that the court should not implement adoption. He also acknowledged it was for the court to consider and balance the sadness the child might feel against the stability of an adoptive home.

Thus, it comes as no surprise that the court did not give the psychologist's opinions much weight. For father to argue otherwise is little more than an invitation for this court to reweigh Dr. Miller's testimony. However, it is the exclusive province of the trial court to evaluate credibility and determine what weight to give testimony. (*In re Laura F.* (1983) 33 Cal.3d 826, 833; *In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.)

It was undisputed that father and the child developed a positive relationship over the course of her dependency. Nevertheless, the juvenile court could properly conclude father did not satisfy his burden of proving the child would suffer great harm by the termination of parental rights. (*In re Lorenzo C., supra*, 54 Cal.App.4th at p. 1342.) The juvenile court did not abuse its discretion

### **DISPOSITION**

The order terminating parental rights is affirmed.